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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 RICHARD ALLEN FOX,

12 Plaintiff,

13 v.

14 MICHAEL J. ASTRUE, Commissioner
15 of the Social Security Administration,

16 Defendant.

17 CASE NO. 10-cv-05669 RBL-JRC

18 REPORT AND
19 RECOMMENDATION ON
20 PLAINTIFF'S COMPLAINT

21 NOTED: November 18, 2011

22 This matter has been referred to United States Magistrate Judge J. Richard
23 Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
24 4(a)(4), and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261,
25 271-72 (1976). This matter has been fully briefed. (See ECF Nos. 17, 18, 19).

26 After considering and reviewing the record, the undersigned finds that the
27 Administrative Law Judge ("the ALJ") erred in his evaluation of the medical evidence by
28 not providing specific and legitimate reasons for rejecting the conclusions of examining

1 physician, Terri Robinson, M.D. Therefore, the Court should order that this matter be
2 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g).

3 BACKGROUND

4 Plaintiff summarizes his background accurately in his opening brief.

5 Plaintiff was born in 1965. Tr.119. He took special education
6 classes for reading and writing, but did graduate from high school. Tr. 30.
7 He worked a number of jobs, including as an installer at Les Schwab, as a
8 long haul trucker, and as a maintenance worker. Tr. 178. On August 23,
9 2007, plaintiff was working at McDonalds unloading a truckload of
10 supplies consisting of 600-700 boxes. Tr. 33. After a few hours he
11 developed back pain that radiated to his left leg. Tr. 389. [On] October 2,
12 2007, [an] MRI revealed mild degenerative disk disease at L4-L5 and L5-
13 S1, with mild canal stenosis at L4-L5 and mild retrolisthesis [a backward
14 slippage of one vertebrae into the vertebrae immediately below] of L5-S1
15 with disc space narrowing. Tr. 283. Plaintiff developed a weakness in his
16 left leg that resulted in random giving [way] and caused him to fall. Tr.
17 267. As a result, plaintiff needed a cane to stand or walk.[] Tr. 267.
18 Plaintiff's pain forced him to alternate between sitting, standing, and
19 walking. Tr. 37. His pain also prevented him from sleeping more than 2
20 or 3 hours a night. Tr. 163, 435.

21 (ECF No. 17, Plaintiff's Opening Brief, pp 2-3).

22 Although plaintiff participated in several rounds of physical therapy, this provided
23 only limited relief. (See Tr. 389, 410). According to at least one physician, he was not a
24 surgical candidate. (See Tr. 408).

25 PROCEDURAL HISTORY

26 Plaintiff filed applications for disability insurance benefits and Supplemental
27 Security Income on October 28, 2008, alleging disability beginning on August 23, 2007
28 (Tr. 119-25, 126-33). His claims were denied initially (Tr. 55-58) and on reconsideration
29 (Tr. 62-66). An ALJ held a hearing on September 2, 2009 (Tr. 25-50). Plaintiff was

1 represented by counsel (Tr. 30-43). The ALJ found the plaintiff not disabled on
2 September 21, 2009. (Tr. 9-24). Plaintiff appealed to the Appeals Council, which denied
3 plaintiff's request for review on July 19, 2010 (Tr. 1-5), making the ALJ's decision the
4 Commissioner's final decision. The final agency decision is subject to judicial review.
5 See 20 C.F.R. §404.981.

6 In his opening brief, plaintiff contends that the ALJ: (1) failed to evaluate properly
7 the medical source opinion; and (2) failed to account for all of plaintiff's limitations in
8 his residual functional capacity analysis. Plaintiff requests that the matter be reversed
9 and remanded for award of benefits. (ECF No. 17, p. 2).

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STANDARD OF REVIEW

11 Plaintiff bears the burden of proving disability within the meaning of the Social
12 Security Act (hereinafter "the Act"). Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir.
13 1999); see also Johnson v. Shalala, 60 F.3d 1428, 1432 (9th Cir. 1995). The Act defines
14 disability as the "inability to engage in any substantial gainful activity" due to a physical
15 or mental impairment "which can be expected to result in death or which has lasted, or
16 can be expected to last for a continuous period of not less than twelve months." 42 U.S.C.
17 §§ 423(d)(1)(A), 1382c(a)(3)(A). Plaintiff is disabled under the Act only if plaintiff's
18 impairments are of such severity that plaintiff is unable to do previous work, and cannot,
19 considering plaintiff's age, education, and work experience, engage in any other
20 substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A),
21 1382c(a)(3)(B); see also Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).
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1 Pursuant to 42 U.S.C. § 405(g), this court may set aside the Commissioner's denial
2 of social security benefits if the ALJ's findings are based on legal error or not supported
3 by substantial evidence in the record as a whole. Bayliss v. Barnhart, 427 F.3d 1211,
4 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).
5 “Substantial evidence” is more than a scintilla, less than a preponderance, and is such
6 “relevant evidence as a reasonable mind might accept as adequate to support a
7 conclusion.” Magallanes v. Bowen, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v.*
8 Heckler, 868 F.2d 323, 325-26 (9th Cir. 1989)); see also Richardson v. Perales, 402 U.S.
9 389, 401 (1971).

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11 The Court “must independently determine whether the Commissioner’s decision
12 is (1) free of legal error and (2) is supported by substantial evidence.” See Bruce v.
13 Astrue, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing Moore v. Comm’r of the Soc. Sec.*
14 Admin., 278 F.3d 920, 924 (9th Cir. 2002)); Smolen v. Chater, 80 F.3d 1273, 1279 (9th
15 Cir. 1996). According to the Ninth Circuit, “[l]ong-standing principles of administrative
16 law require us to review the ALJ’s decision based on the reasoning and actual findings
17 offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit what the
18 adjudicator may have been thinking.” Bray v. Comm’r of SSA, 554 F.3d 1219, 1226-27
19 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other citation
20 omitted)); see also Stout v. Commissioner of Soc. Sec., 454 F.3d 1050, 1054 (9th Cir.
21 2006) (“we cannot affirm the decision of an agency on a ground that the agency did not
22 invoke in making its decision”) (citations omitted).

DISCUSSION

1. The ALJ erred in his consideration of the medical opinion evidence.

The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician or psychologist. Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (*citing Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991); Pitzer v. Sullivan, 908 F.2d 502, 506 (9th Cir. 1990)). Even if a treating or examining physician’s opinion is contradicted, that opinion “can only be rejected for specific and legitimate reasons that are supported by substantial evidence in the record.” Lester, *supra*, 81 F.3d at 830-31 (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)). However, the ALJ “need not discuss *all* evidence presented.” Vincent on Behalf of Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (per curiam). The ALJ must only explain why “significant probative evidence has been rejected.” Id. (*quoting Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981)).

In general, more weight is given to a treating medical source's opinion than to the opinions of those who do not treat the claimant. Lester, supra, 81 F.3d at 830 (*citing Winans v. Bowen*, 853 F.2d 643, 647 (9th Cir. 1987)). An examining physician's opinion is "entitled to greater weight than the opinion of a nonexamining physician." Lester, supra, 81 F.3d at 830 (citations omitted); see also 20 C.F.R. § 404.1527(d). A non-examining physician's or psychologist's opinion may not constitute substantial evidence by itself sufficient to justify the rejection of an opinion by an examining physician or psychologist. Lester, supra, 81 F.3d at 831 (citations omitted). However, "it may constitute substantial evidence when it is consistent with other independent evidence

1 in the record.” Tonapetyan, supra, 242 F.3d at 1149 (*citing Magallanes, supra*, 881 F.2d
2 at 752). “In order to discount the opinion of an examining physician in favor of the
3 opinion of a nonexamining medical advisor, the ALJ must set forth specific, *legitimate*
4 reasons that are supported by substantial evidence in the record.” Van Nguyen v. Chater,
5 100 F.3d 1462, 1466 (9th Cir. 1996) (*citing Lester, supra*, 81 F.3d at 831).

6 Plaintiff’s main complaint in this case is that the ALJ failed to evaluate properly
7 the functional assessment provided by examining physician Terri Robinson, M.D., who
8 concluded that plaintiff could only be expected to stand and walk for two hours in an
9 eight hour work day and sit for four hours in an eight hour work day. Tr. 439.
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11 Instead, the ALJ gave significant weight to the residual functional capacity
12 assessment provided by non-examining, reviewing physicians with the Disability
13 Determination Services (“DDS”) (Tr. 21). Dr. Robinson and DDS agree that plaintiff
14 could only be expected to stand and walk for two hours in an eight hour work day. But
15 DDS disagreed with Dr. Robinson’s assessment regarding plaintiff’s ability to sit for only
16 *four* hours in an eight hour work day, and instead concluded that plaintiff could sit about
17 six hours in an eight hour work day. If the ALJ had accepted Dr. Robinson’s
18 conclusions, then plaintiff would have been considered disabled. Instead, the ALJ
19 accepted DDS’ conclusions and determined that he was not disabled.
20

21 Plaintiff argues that the ALJ failed to set out a detailed and thorough summary of
22 the facts and conflicting clinical evidence for rejecting Dr. Robinson’s opinion regarding
23 his functional limitations in favor of DDS’ opinion. (ECF No. 17, at pp. 6-8).
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1 Initially, it should be noted that although plaintiff also contends that the ALJ
2 improperly evaluated the conclusions of other treating physicians, none of these other
3 treating physicians completed a functional assessment. (See, e.g., Tr. 21-22, 383, 408,
4 386, 416). Nevertheless, the reasons provided by the ALJ for rejecting Dr. Robinson's
5 conclusions are suspect. The ALJ stated:

6 Dr. Robinson examined the claimant on only one occasion. His physical
7 examination findings that the claimant had mild atrophy of the left leg with
8 some radicular symptoms and decreased strength in the left quadriceps,
9 hamstrings, hip flexors, are inconsistent with those reported by Dr. Veech
10 just 2 ½ months previously as discussed above (Exhibit 20F). It appears Dr.
11 Robinson relied heavily on the subjective reports of the claimant in making
12 his opinion. . . . Dr. Robinson's opinion that the claimant requires an
13 assistive device such as a cane for ambulation is not given full weight in
14 light of report of physical examinations performed by Dr. Dunaway, Dr.
15 Jacobsen, and Dr. Veech which revealed minimal neurological deficit as
16 discussed above. Although the claimant reported to Dr. Robinson that he
17 could no longer afford pain medications or to see a physician for
18 medication prescriptions, he also reported he was taking Fluoxetine for
19 depression. (Exhibit 23F/1-2). The record also reveals that the claimant
20 returned to Dr. Dunaway on August 10, 2009, requesting referral for chest
21 x-ray. At that time it was reported he was taking prescription pain
22 medication on an as needed basis (Exhibit 21F/1). He testified at the
23 hearing that he is on state general assistance and currently has access to
24 medical care.

17 (Tr. 21-22).

18 There are several problems with the ALJ's evaluation. First, when reviewing Dr.
19 Robinson's report, it is inconsistent with the ALJ's conclusion that Dr. Robinson was
20 relying heavily on plaintiff's "subjective reports." (Tr. 21-22). On the contrary, Dr.
21 Robinson performed a physical examination, including an examination of claimant's
22 extremities, coordination/station/gait, range of motion, and motor strength/muscle bulk
23 and tone, and sensory examinations. The ALJ's conclusion that Dr. Robinson relied
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1 heavily on subjective reports is contradicted clearly by the physical examination and
2 functional assessment analysis that is noted in the record. For example, Dr. Robinson's
3 assessment of atrophy was premised in part on specific objective evidence, that is,
4 circumference differences between plaintiff's right and left legs. (See Tr. 439). Dr.
5 Robinson noted that plaintiff's "[t]high circumference on the left side was 38.0 cm
6 compared with 41.0 cm on the right. Calf circumference 32.0 cm on the left and 33.0 cm
7 on the right." (Tr. 439). There appear to be no other corresponding or contradictory
8 measurements by any of his other treating physicians. (See, e.g., Tr. 383, 386, 408, 416).
9 Therefore, if anything, Dr. Robinson's objective assessment, at least on that point, is
10 uncontradicted. Overall, the ALJ failed to provide specific and legitimate reasons for
11 rejecting Dr. Robinson's functional assessment.

13 Second, Dr. Robinson's physical functional assessment was not inconsistent with
14 the opinion of Dr. Veech. Dr. Veech never provided a physical functional assessment.
15 Although some of his observations may have been inconsistent with Dr. Robinson's
16 observations, Dr. Veech never opined that plaintiff could sit for more than four hours in
17 an eight hour work day. (See Tr. 436-439).

18 Third, Dr. Robinson's conclusion that plaintiff needed his cane is not contradicted
19 by his treating physicians. (See Tr. 383, 386, 415).

20 Since Dr. Robinson was an examining physician, and his opinion was contrary to
21 the opinions of the non-examining, reviewing physician at DDS, the ALJ must set forth
22 specific, legitimate reasons that are supported by substantial evidence in the record to
23 credit the opinion of the non-examining physician over the opinion of Dr. Robinson. See
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1 | Van Nguyen v. Chater, 100 F.3d 1462, 1466 (9th Cir. 1996) (*citing Lester, supra*, 81 F.3d
2 at 831). He failed to do so, here.

3 While this Court will not second guess an ALJ's interpretation of the evidence, the
4 ALJ's interpretation must be supported by substantial evidence, which in this case it is
5 not. Therefore, this matter should be reversed for further findings.

6 2. The ALJ assigned to this case following remand must evaluate anew plaintiff's
7 residual functional capacity.

8 Based on a review of the relevant record and based on the ALJ's errors already
9 discussed, the Court finds that the ALJ's finding regarding plaintiff's residual functional
10 capacity was not based on substantial evidence in the record as a whole. Therefore, the
11 ALJ assigned to this matter following remand must evaluate anew plaintiff's residual
12 functional capacity. Similarly, the ALJ assigned to this matter following remand must, if
13 necessary based on the five-step sequential disability evaluation process, obtain new
14 vocational expert testimony.

16 Simply put, plaintiff's award seems to hang on the very smallest of differences
17 between DDS' conclusions and Dr. Robinson's conclusions. There is scant information
18 in the file that provides substantial evidence for either conclusion. Plaintiff's award or
19 denial of benefits should not rise or fall on a record such as this.

20 3. Plaintiff is not entitled to a remand for direct award of benefits.

22 The Ninth Circuit has put forth a "test for determining when evidence should
23 be credited and an immediate award of benefits directed." Harman v. Apfel, 211
24 F.3d 1172, 1178, 2000 U.S. App. LEXIS 38646 at **17 (9th Cir. 2000). It is

1 appropriate where: (1) the ALJ has failed to provide legally sufficient reasons for
2 rejecting such evidence, (2) there are no outstanding issues that must be resolved
3 before a determination of disability can be made, and (3) it is clear from the record
4 that the ALJ would be required to find the claimant disabled were such evidence
5 credited. Harman, 211 F.3d at 1178 (*quoting Smolen*, 80 F.3d at 1292).

6 Here, outstanding issues must be resolved. See Smolen, 80 F.3d at 1292.
7 Although the ALJ failed to provide legally sufficient reasons for rejecting some of the
8 medical evidence in this matter, the medical evidence is not entirely conclusive.
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10 The ALJ is responsible for determining credibility and resolving ambiguities and
11 conflicts in the medical evidence. Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998);
12 Andrews v. Shalala, 53 F.3d 1035, 1043 (9th Cir. 1995). If the medical evidence in the
13 record is not conclusive, sole responsibility for resolving conflicting testimony and
14 questions of credibility lies with the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th
15 Cir. 1999) (*quoting Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971)); see also
16 Calhoun v. Bailar, 626 F.2d 145, 150 (9th Cir. 1980).

17 Therefore, remand is appropriate to allow the Administration the opportunity to
18 consider properly all of the medical evidence as a whole, to develop the record where
19 needed, and to incorporate the properly considered medical evidence into the
20 consideration of plaintiff's residual functional capacity. See Sample, 694 F.2d at 642.
21

22 CONCLUSION

23 Based on these reasons, and the relevant record, the undersigned recommends that
24 this matter be **REVERSED** and **REMANDED** to the administration for further

1 consideration pursuant to sentence four of 42 U.S.C. § 405(g). **JUDGMENT** should be
2 for **PLAINTIFF** and the case should be closed.

3 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
4 fourteen (14) days from service of this Report to file written objections. See also Fed. R.
5 Civ. P. 6. Failure to file objections will result in a waiver of those objections for
6 purposes of de novo review by the district judge. See 28 U.S.C. § 636(b)(1)(C).
7 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
8 matter for consideration on November 18, 2011, as noted in the caption.
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10 Dated this 24th day of October, 2011.

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12 
13 J. Richard Creatura
14 United States Magistrate Judge
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